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verdict is not reversible error. It relied in part on a statute which prohibits reversal in the absence of error injuriously affecting appellant's substantial rights,¹⁴ and in part on the Dunn case.¹⁵ The Dunn case, however, was one where the defendant was acquitted of possessing intoxicating liquor but convicted of maintaining a nuisance by maintaining a place for the sale of intoxicating liquor. If defendant were to stand convicted of larceny and receiving the identical property as stolen goods, as in the Bargesser and Gordon cases,¹⁶ it is believed that the court would not hesitate to disregard as obiter the view expressed in the principal case, and reverse.

REAL PROPERTY — DOWER — EFFECT OF JUDGMENT AND EXECUTION*

In a recent decision, the Supreme Court of Florida has laid down the unequivocal doctrine that a judgment and execution sale of a married debtor's real estate not only divests him of all title thereto but also completely extinguishes the wife's right of dower in the property.¹ This represents a fundamental change in the attitude of the Florida court toward this question and is completely contrary to the great weight of authority in other jurisdictions.

As stated in a standard authority, the majority rule—and erstwhile Florida rule—is: "A sale of lands under execution against the husband issued under a judgment rendered against him after the marriage will not cut off the wife's dower * * *. The law is settled in accordance with the above * * * in those states where the common law rule prevails and if the husband by his own conveyance cannot divest the wife's dower, this cannot be done by a sale in execution under judgment against him."²

There is no doubt that this rule represents the great weight of authority. The rule is so well settled that in recent years the courts have very seldom been called upon to determine the question; it is so well settled that it is thus stated without qualification even in encyclopedias of law.³ State after state has laid down this rule in the most unequivocal language.⁴

¹ Criminal Procedure Act, Sec. 924.33, 1941 Statutes of Fla.

² Note 6, *supra*.

³ Note 2, *supra*.

* In re Hester's Estate, 28 So (2d) 164, (Fla. 1946).

⁴ In re Hester's Estate, *supra*.

* Annotation, 18 LRA 75, 78. Annot. cites Ind., Mo., Mass., N. J., Miss., Del., Minn.

* "It is clear that at the common law sale under a judgment rendered subsequent to marriage will not bar the widow of her dower." 21 Am. Jur. 153.

* "It hardly seems necessary to cite authorities to the proposition that at common law the wife could not be deprived of dower rights in the real estate of her husband through sale upon execution under a judgment obtained against him subsequently to marriage. * * * It has

Prior to the Hester decision this had long been regarded as settled law in Florida. It was understood that a sale of the husband's property by virtue of a judgment and execution against him was ineffective to divest the wife's right of dower.⁹ The decision in the Pingree case—written by Justice Terrell, the author of the Hester opinion—unequivocally holds the rule to be that a sheriff's deed does not divest a widow of her inchoate right of dower.¹⁰

Although the Hester case completely upsets what was regarded as settled law in Florida, it does not specifically over-rule the earlier Florida cases which followed the great weight of authority. Instead, the court has attempted to distinguish the Roan and Pingree cases and to minimize the previous holdings on the somewhat equivocal ground that they were "perhaps obiter."¹¹

There are, of course, certain exceptions to the majority rule which are well recognized. The most common exception is foreclosure of a mortgage upon the husband's property in which the wife has joined. In such a case, if the wife is made party, foreclosure is effective to divest dower.¹² Another exception is a levy upon a claim constituting a charge upon the real property of the husband pre-existing his marriage or upon a purchase money mortgage or other claim which is a portion of the transaction by which the property was acquired.¹³ A third exception, in some jurisdictions, is in the event of a partition suit between tenants in common.¹⁴ It has also been held that a condemnation proceeding is effective to divest dower, but it is interesting to note that the reasoning behind this holding seems to be that eminent domain is regarded as a claim superior to and pre-existing any claim of dower.¹⁵

Apart from these exceptions, however, it is the well recognized rule that execution sale of the husband's property on a judgment against

been held repeatedly that the inchoate right of dower attaches at the moment the husband's interest in the realty becomes fixed during coverture, so that his creditors cannot by any proceedings against him impair or destroy the right. (Citing among others *McMahon v. Russell*, 17 Fla. 698.) *Dayton v. Corser*, 53 N.W. 717, 18 LRA 80 (Minn. 1892). "Sales under execution leave the widow's right to dower unaffected." *Owen v. Slater*, 26 Ala. 547 (1855). See also: *Butler v. Fitzgerald*, 61 N.W. 740, 27 LRA 252 (Nebr. 1895); *Shell v. Duncan*, 10 S.E. 330, 5 LRA 821 (S.C. 1889); *Harmon v. Peery*, 119 S.E. 126, 134 S.E. 701 (Va. 1923, 1926); *Swartz v. Smole*, 5 Pac (2d) 566, (Mont. 1931). Annot. 18 LRA 75.

⁹ *McMahon v. Russell*, 17 Fla. 698 (1880); *Roan v. Holmes*, 13 So. 339, 21 LRA 180 (1893); *Pingree v. DeHaven*, 105 So. 147 (1925).

¹⁰ "It is well settled that a sheriff's deed does not divest a widow of her inchoate right of dower." (Citing *Roan v. Holmes*, *supra*.) *Pingree v. DeHaven*, *supra*.

¹¹ *In re Hester's Estate*, *supra*.

¹² *Roan v. Holmes*, *supra*, *McMahon v. Russell*, *supra*.

¹³ *Swartz v. Smole*, *supra*; *Sheffield v. Cook*, 98 Atl. 161 (R.L. 1916).

¹⁴ *Haggerty v. Wagner*, 48 N.E. 388, 39 LRA 384 (Ind. 1897).

¹⁵ *Briegel v. Briegel*, 160 Atl. 581 (Pa. 1931).

him does not divest dower. That this rule is so strong as to have almost the effect of statute is evidenced by the action of a number of states which have specifically altered the majority, and common law, rule by statutory enactment. Thus, under an Indiana law the wife's dower interest was reduced from one-third to one-fifth in case of judgment and levy, but she could still claim and receive an assignment of dower from the proceeds of the execution.¹² Iowa also passed a statute nullifying in part the majority rule.¹³

Florida has no such statute, and the Florida court by differentiating between the Hester and Roan cases in effect re-affirmed that portion of the rule which holds that a husband's voluntary conveyance without joinder by the wife is not effective to divest the wife's dower.¹⁴

The court, however, did not follow through to the majority doctrine that whenever the husband cannot by his voluntary act divest the wife's dower, it cannot be divested by judgment against the husband followed by judicial sale. The Florida court squarely holds instead that a judgment against the husband followed by execution and sale thereunder extinguishes the interest of both husband and wife. The court adds that the correctness of this holding is fortified by the fact that since the decision in the Roan case a widow's estate has been changed by statute from a life estate to a fee.¹⁵ It is somewhat difficult to follow this reasoning since in most, if not all, of the states following the majority rule the widow is entitled, on the death of the husband, to a fee simple interest.¹⁶ The Florida court also held that the statute granting dower right must be read in *pari materia* with Chapters 55 and 86, Florida Statutes, 1941.¹⁷ Careful study of these chapters fails to reveal anything which by its terms modifies the widow's rights of dower or the common law.¹⁸

It therefore appears that the Florida court by its decision has now abrogated that portion of the majority rule with respect to extinguishment of dower by levy and execution and yet attempts to recognize that portion of the majority rule which precludes divestiture of dower by voluntary action of the husband.

The net effect of this decision is to bring back to life the essentials

¹² *Sullivan State Bank v. First Nat'l Bank*, 146 N.E. 403 (Ind. 1925).

¹³ *Knutson v. Rosenberger*, 116 N.W. 687 (Iowa, 1908).

¹⁴ *Roan v. Holmes*, *supra*. Indeed, our dower statute embodies that portion of the rule into our statutory law: "Dower shall be one-third part in fee simple of the real property which was owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law." Laws 1945, c. 22847; Sec. 731.34 F.S.A. 1941.

¹⁵ *In re Hester's estate*, *supra*.

¹⁶ *Dayton v. Corser*, *supra*.

¹⁷ These statutes embrace "Judgments and Executions" and "Enforcement of Statutory Liens."

¹⁸ "The common law as to dower prevails in Florida except as modified by statute." *Henderson v. Usher*, 170 So. 846, 853, (Fla. 1936).

of the common law doctrine of fine and recovery which permits the wife's dower to be barred by fictitious judicial proceeding,¹⁹ despite the fact that by statute fine and recovery has been abolished in Florida since 1835.²⁰

Under the ruling in the Hester case it is quite possible for a husband to dispose of real property completely during coverture by a modification of the fine and recovery process. If a husband desires to divest himself of real property not homestead in character without joinder in the conveyance by his wife, he can receive the consideration therefor as a "loan," giving a promissory note instead of a deed to the purchaser. The purchaser may then sue upon the note, secure a judgment, levy upon the land, purchase at the judicial sale and take good title free of the wife's dower right. The rule in the Hester case would validate the transaction unless the wife could prove fraud, which would be most difficult in such a situation.

The Hester doctrine as it now stands may well tend to throw wide the doors in Florida to manifest frauds upon the dower rights of married women.

¹⁹ 2 Blackstone Comm. 137; 4 Kent Comm. 1.

²⁰ Act Feb. 4, 1835, Par. 2; Sec. 689.08 F.S.A. 1941.